80-36

Supreme Court, U.S.
FILED
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MICHAEL RODAK, JR., CLERK

No.....

In The

Supreme Court of the United States

OCTOBER TERM, 1979

JOHN H. THOMPSON, JR., THOMPSON TRUCK AND EQUIPMENT COMPANY, JOHN H. THOMPSON III, PAT THOMPSON AND NIGHT AND DAY TRUCK LEASE RENTAL, INC.,

Petitioners,

v.

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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W. KYLE GOOCH
On the Petition

QUESTIONS PRESENTED

I.

Whether it is an abuse of discretion for the United States Court of Claims to enter a summary judgment for the United States and against private parties, based on an earlier dismissal by the Postal Service Board of Contract Appeals of a certain named party, for want of prosecution, in which the private parties were not named as parties and where there was no finding that the named party represented those parties not before the Board.

II.

Whether a private citizen can be said to have waived administrative jurisdiction, in a government contract dispute, when that party's presence before an administrative tribunal was due to errors by agents and employees of the administrative agency and where no hearing was ever conducted between the parties.

TABLE OF CONTENTS

	Page
The Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
Federal Jurisdiction	5
Reasons for Granting the Writ	5
A. The Decision of the Court of Claims Improperly Dismissed Parties Whose Claims Were Never Presented to a Contracting Officer and Whose Claims Were Never Before the Postal Service Board of Contract Appeals	7
B. This Court Should Determine Whether the Harsh Results of a Summary Judgment Should be Imposed Upon a Citizen, in a Government Contract Dispute, When that Judgment is Predicated Upon Erroneous Administrative Proceedings Before a Board of Contract Appeals and When the Citizen's Presence Before That Board Results From Errors on the Part of Government Employees	8
Conclusion	12
Certificate of Service	13
Appendix	
A. Dismissal Order of the Postal Service Board of Contract Appeals	A-1 - A-2
B. Order of the United States Court of Claims	B-1 - B-6
C. Order Denying Motion for Rehearing	C-1
D. Constitution and Statutes	D-1 - D-7

INDEX OF AUTHORITIES

Page

Court Decisions

Bethlehem Steel Corporation v. United States, 191 Ct. Cl. 141, 423 F.2d 300 (1970) 11

General Dynamics Corp. v. United States, 214 Ct. Cl. 607, 558 F.2d 985 (1977) 10, 11

Constitution and Statutes

United States Constitution, Fifth Amendment D-1

Administrative Procedure Act, Section 4, 5 U.S.C. § 553 ..... D-2 - D-3

Contract Disputes Act of 1978, Section 6, 41 U.S.C. § 605; Section 10, 41 U.S.C. § 609 ..... D-4 - D-7

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Petitioners,

v.

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

John H. Thompson, Jr., Thompson Truck and Equipment Company, John H. Thompson III, Pat Thompson and Night and Day Truck Lease Rental, Inc. respectfully pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Claims entered in this cause on March 7, 1980.

OPINIONS BELOW

The Order and Opinion of the United States Court of Claims is unreported and is reproduced as Appendix B (pp. B-1 - B-6, infra).

JURISDICTION

The judgment and opinion of the Court of Claims was entered on March 7, 1980. Petitioners made timely Motion

for Rehearing en banc, which Motion was denied by Order of the Court of Claims on April 25, 1980 (Appendix C, p. C-1, infra). The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provision involved is the Fifth Amendment to the United States Constitution. (Appendix D, p. D-1, infra).

The Federal statutory provisions involved are as follows: Administrative Procedure Act, Section 4, (5 U.S.C. § 553) (Appendix D, pp. D-2 - D-3, infra).

Contract Disputes Act of 1978, Sections 6 and 10 (41 U.S.C. § 605 and 41 U.S.C. § 609) (Appendix D, pp. D-4-D-7, infra).

STATEMENT OF THE CASE

All of the Petitioners, with the exception of Night and Day Truck Lease Rental, Inc. (hereinafter referred to as "NIGHT AND DAY") were general contractors engaged in the business of transporting United States mail between various cities in an area of the United States designated by the Postal Service as the "Southern Region." Many of the Petitioners were awarded postal contracts by the Transportation Management Officer (contracting officer) in Dallas, Texas and Petitioners John H. Thompson, Jr., individually and d/b/a Thompson Truck and Equipment Company, were awarded postal contracts by the Transportation

Management Officer in Memphis, Tennessee, pursuant to public bidding statutes.

In November 1977, all of the general contractors, referred to collectively as the THOMPSON FAMILY, subcontracted the postal contracts referenced above to Petitioner NIGHT AND DAY, a Texas corporation in which members of the THOMPSON FAMILY are officers and directors. NIGHT AND DAY performed services for the UNITED STATES POSTAL SERVICE, Respondent herein, for approximately eight months, at which time it abandoned, or was constructively discharged from, all contracts due to the wrongful imposition and selective enforcement of a ninety-eight percent (98%) on time efficiency rule, imposed, but not legally promulgated, by the POSTAL SERVICE in the Southern Region of the United States. The POSTAL SERVICE then called upon the THOMPSON FAMILY to complete the terms of the contracts in question, but the THOMPSONS abandoned said contracts or were constructively discharged for the identical reasons as set forth by Petitioner NIGHT AND DAY above.

Pursuant to the contractual provisions, as contained in all postal contracts, a claim for damages from the so-called "98% Rule" was made solely on behalf of Petitioner, John H. Thompson, Jr. and only on those contracts executed by and between Mr. Thompson and the Transportation Management Officer in Dallas, Texas. Upon receipt of Mr. Thompson's claim, the Transportation Management Officer in Dallas, Texas did not issue a final decision, as required

pursuant to all contracts, but *erroneously* forwarded the claim (consisting of a one page letter from Mr. Thompson's prior counsel) to the Postal Service Board of Contract Appeals (PSBCA) in Washington, which *erroneously* treated said letter as a notice of an appeal from a decision of a contracting officer, although aware that no decision had ever been issued. The PSBCA then *erroneously* instructed Mr. Thompson's counsel to file a complaint with that administrative body, and Mr. Thompson's counsel filed the requested complaint solely on behalf of Mr. Thompson. Subsequently, Mr. Thompson's action was dismissed with prejudice for want of prosecution without any hearing or other adjudication on the merits of his claim (Appendix A, pp. A-1 - A-2, infra).

On or about May and June of 1979, under separate cover, the THOMPSON FAMILY, including Mr. Thompson and NIGHT AND DAY, served claims upon both the Transportation Management Officers in Memphis and Dallas. Both contracting officers refused to issue decisions on said claims and Petitioners filed their complaints with the United States Court of Claims after sixty days had elapsed from receipt of the claims by the respective contracting officers, in compliance with Section 6 of the Contract Disputes Act of 1978, 41 U.S.C. § 605 (Appendix D, pp. D-4 - D-5, infra).

The UNITED STATES filed a Motion for Summary Judgment as to all Petitioners and, as a basis for said Motion, relied entirely on the previous dismissal by the PSBCA, and judgment was entered by the Court of Claims

on March 7, 1980 (Appendix B, pp. B-1 - B-6, infra). Although ruling that no final decision was ever issued by a contracting officer, the Court of Claims nevertheless held that all Petitioners had waived their right to challenge administrative jurisdiction by appearing before the PSBCA and failing to exhaust administrative remedies before that tribunal. The Court of Claims did not discuss its reasoning for dismissing members of the THOMPSON FAMILY, other than John H. Thompson, Jr., who were never before the PSBCA. Petitioners filed a Motion for Rehearing en banc, which Motion was denied without opinion (Appendix C, p. C-1, infra).

FEDERAL JURISDICTION

Jurisdiction in the United States Court of Claims was predicated on Section 10 of the CONTRACT DISPUTES ACT of 1978, 41 U.S.C. § 609 (Appendix D, pp. D-5 - D-7, infra).

REASONS FOR GRANTING THE WRIT

The THOMPSON FAMILY's complaint, and the complaint of NIGHT AND DAY, which were never heard by any contracting officer or tribunal, concerned a rule adopted only in the Southern Region of the United States by the POSTAL SERVICE. The THOMPSON FAMILY's challenge of this rule, which was not properly published pursuant to Section 4 of the Administrative Procedure Act (5 U.S.C. § 553) (Appendix D, pp. D-2 - D-3, infra), resulted in the imposition of harsh fines and penalties culminating

in the abandonment of all postal contracts by NIGHT AND DAY and the THOMPSON FAMILY.

The UNITED STATES POSTAL SERVICE depends upon contractors, such as members of the THOMPSON FAMILY, in carrying mail throughout cities and towns in the United States. Unlike many large private contractors that supply goods to the government, or are engaged in building construction for the government, and derive a relatively small amount of income from government contracting, mail haulers, such as members of the THOMPSON FAMILY, are solely dependent upon government contracting for their income. The loss of government contracts, as in the present case, results in economic disaster and financial ruin.

John H. Thompson, Jr., a resident of the small rural East Texas town of Atlanta, Texas, is a common example of most mail haulers, a self-made man who began driving a mail truck for the government over twenty-five years ago and who built his business slowly, overcoming obstacles of increasing fuel and labor costs and equipment rental and purchases. In his first dispute with the POSTAL SERVICE in twenty-five years, John H. Thompson, Jr. read the contracts he had signed. He read a portion of his contracts which stated that all disputes, under the contracts, would be submitted to a contracting officer, who would issue a decision, with appeal of that decision, if necessary, to a board of contract appeals. Due to unexcused errors on the part of the UNITED STATES POSTAL SERVICE, no

decision was issued on his claim. The claim was referred prematurely and erroneously to the PSBCA by the POSTAL SERVICE, and the claims of the THOMPSON FAMILY and NIGHT AND DAY were never heard.

In addition to the contracts, Mr. Thompson and the members of his family have read the Due Process clause of the Fifth Amendment to the United States Constitution which guarantees that citizens will receive due process from their government. The THOMPSONS believe that when the government enters the marketplace, it must come as a symbol of equity and fairness. It must not expect more of its citizenry than it expects from itself. Mr. Thompson and his family are not asking the Court to rule on their complaint, as to the improperly adopted rules and their immense damages resulting from that adoption; they are only asking for their day in court and an opportunity to be heard.

A. THE DECISION OF THE COURT OF CLAIMS IMPROPERLY DISMISSED PARTIES WHOSE CLAIMS WERE NEVER PRESENTED TO A CONTRACTING OFFICER AND WHOSE CLAIMS WERE NEVER BEFORE THE POSTAL SERVICE BOARD OF CONTRACT APPEALS.

The Court of Claims has granted the UNITED STATES' Motion for Summary Judgment, as to the entire THOMPSON FAMILY, based on the proceedings before the PSBCA in 1978. As to the Petitioners other than John H. Thompson, Jr., this action is clearly erroneous and is an abuse of discretion. John H. Thompson, Jr., who is only

one of the general contractors involved in the present case, is the *only* party who filed a complaint before a contracting officer in the previous action in 1978 and is the *only* party who filed any pleadings before the PSBCA. None of the other general contractors, or the subcontractor NIGHT AND DAY, were parties to that previous action and there has been no finding by any tribunal that Mr. Thompson represented the remaining members of his family or NIGHT AND DAY. Due to the absence of any findings or pleadings that John H. Thompson, Jr. acted as an agent for the other general contractors or the subcontractor, no such finding can be assumed or implied from the sustaining of a Motion for Summary Judgment. Thus, the action of the Court of Claims was in error and a violation of the Due Process clause of the Fifth Amendment to the Constitution (Appendix D, p. D-1, infra).

B. THIS COURT SHOULD DETERMINE WHETHER THE HARSH RESULTS OF A SUMMARY JUDGMENT SHOULD BE IMPOSED UPON A CITIZEN, IN A GOVERNMENT CONTRACT DISPUTE, WHEN THAT JUDGMENT IS PREDICATED UPON ERRONEOUS ADMINISTRATIVE PROCEEDINGS BEFORE A BOARD OF CONTRACT APPEALS AND WHEN THE CITIZEN'S PRESENCE BEFORE THAT BOARD RESULTS FROM ERRORS ON THE PART OF GOVERNMENT EMPLOYEES.

It is the position of Petitioner John H. Thompson, Jr., and the further position of all other members of his family in the event the Court is of the opinion that the dismissal of John H. Thompson, Jr. by the PSBCA included said Petitioners, that a summary judgment should not have been

entered against him, which judgment was based on earlier proceedings (not a hearing) before the PSBCA. In the Court of Claims ruling, the UNITED STATES is allowed to capitalize upon mistakes by its own personnel and deprive a citizen of his day in court and the opportunity to be heard under the Due Process guarantees of the Fifth Amendment to the United States Constitution (Appendix D, p. D-1, infra).

The first mistake in the previous case was made by the Transportation Management Officer (contracting officer) in Dallas, Texas, a POSTAL SERVICE employee, in not issuing a final decision, or in fact any type of decision, concerning the claim of John H. Thompson, Jr., although required to do so under the regulations. The Court of Claims has correctly held that no decision of a contracting officer was ever issued concerning Mr. Thompson's claim as required in Section 1-313(d) of the Postal Service Manual. Instead of issuing a decision, the contracting officer forwarded Mr. Thompson's claim to the PSBCA in Washington, D.C.

The second mistake was made by the PSBCA in treating Mr. Thompson's claim as a notice of an appeal from a decision of a contracting officer when certainly the Board was put on notice that no decision had ever been made. As stated by the Court of Claims:

> "The Postal Service contracting officer forwarded the letter directly to the Postal Service Board of Contract Appeals, which treated the letter as a notice of appeal. The Board notified Thompson that it had received the 'notice of appeal,' and provided him with *a due date*

> by which to file a complaint." (Appendix B, p. B-3, infra) (emphasis added).

Mr. Thompson's counsel in 1978, with offices in the small East Texas town of Longview and obviously confused by government action at this point, quite logically responded to a mandate from a government appellate tribunal in Washington by filing the requested complaint. Subsequently, the action was dismissed with prejudice for want of prosecution, and Mr. Thompson's claims were never heard.

The Court of Claims has ruled, relying on *General Dynamics Corp. v. United States*, 214 Ct. Cl. 607, 558 F.2d 985 (1977) that Mr. Thompson waived his right to challenge the lack of jurisdiction before the PSBCA by filing the complaint pursuant to the Board's mandate. This reasoning, however, ignores the initial errors by government employees in the present case and totally ignores the rationale of the *General Dynamics* decision. *General Dynamics* involved a party who submitted to a full hearing before a board of contract appeals and then sought reversal based on a technical defect in administrative jurisdiction. Relying on this decision, the Court of Claims has stated in the present case:

> "While judicial jurisdiction can never be waived by litigants, Board jurisdiction, which grows out of contractual provisions, may be expanded by agreement of the parties — through express amendment of their agreement or through administration of that agreement." (Appendix B, p. B-5, infra).

Such a holding is consistent with the reasoning in common law arbitration, but it assumes some type of agreement

and submission to a hearing. In the mass confusion resulting from the failure of a contracting officer to issue a decision in the present case and in the erroneous treatment of the "claim" as a notice of appeal by the PSBCA, it is apparent that no such agreement existed in the present case and certainly there was no submission of the matters in dispute to a hearing. In *General Dynamics*, the litigants had their day in court; the THOMPSON FAMILY has not been heard.

The THOMPSON FAMILY refers the Court to the decision of *Bethlehem Steel Corporation v. United States*, 191 Ct. Cl. 141, 423 F.2d 300 (1970) in which the Court stated:

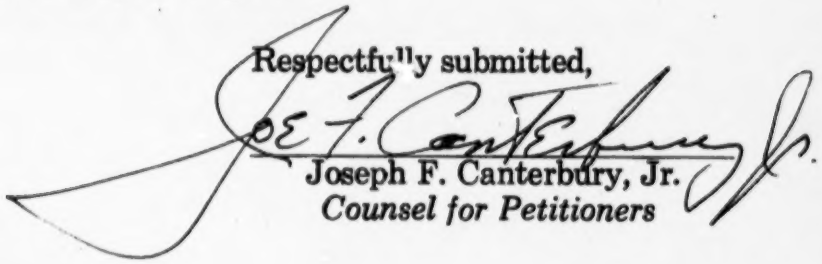
> "Agency officials have the means and duty to be aware of their own regulations to a greater extent than outsiders. It is not fair to throw the consequences of such a mutual mistake wholly on the party least responsible for causing it . . . . The requirement for exhaustion of administrative remedies is *not* inflexible in some *exceptional circumstances.*" (*Id* at 304) (emphasis added).

Such an exceptional circumstance is now before this Court. Although this Court receives thousands of petitions seeking reversals for various reasons, this Court is asked to grant this Petition to allow Petitioners a hearing in the first instance. The granting of the Petition will not only do equity, but will instruct the governmental agencies to not capitalize on their own laws to the detriment of the citizens with whom they contract. In the interest of equity and fairness, the claims of Petitioners should be heard.

CONCLUSION

For the reasons set out herein, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,



Joseph F. Canterbury, Jr.
Counsel for Petitioners

Of Counsel

SMITH SMITH DUNLAP & CANTERBURY

W. KYLE GOOCH
On the Petition

CERTIFICATE OF SERVICE

This is to certify that on the 8th day of June, 1980, three true and correct copies of the foregoing Petition for Writ of Certiorari to the United States Court of Claims were served on the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530 and on Counsel for Respondent, Lynn J. Bush and Alice Daniel, Office of the Attorney General, Civil Division, Room 3143, Department of Justice, Washington, D.C. 20530 by depositing same in the United States mail, with First Class air mail postage pre-paid.

Joseph F. Canterbury, Jr.

APPENDIX A

Appeal of — February 8, 1979

JOHN H. THOMPSON, JR.

Under HRC Nos. 75114, 75122, 75123,
75511, 75538, 75912, 77012 and 75218

PSBCA No. 535

APPEARANCE FOR APPELLANT:

Grady Inzer, Esq.
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Longview, TX 75601

APPEARANCE FOR RESPONDENT:

Michael J. Vandamm, Esq.
Law Department
U. S. Postal Service
Washington, D.C. 20260

DISMISSAL ORDER

The complaint in this appeal was filed on August 3, 1978. Subsequent to that time, the Appellant has failed to respond to Postal Service discovery actions and an order of the Board pertaining to a Postal Service Motion to Dismiss for Want of Jurisdiction.

By Order of January 9, 1979, the Appellant was afforded an opportunity to show cause as to why the appeal should not be dismissed for failure to prosecute. The Board has received no response to that order or any communication whatsoever from the Appellant, subsequent to receipt of the Appellant's complaint.

It is concluded that the Appellant has abandoned its appeal and, pursuant to § 955.32 "Dismissal for Failure to Prosecute" of the Board's Rules, the appeal is dismissed with prejudice.

Board of Contract Appeals

By: _____
Joseph M. Cowden
Vice Chairman

I concur:

_____
James A. Cohen, *Chairman*

I concur:

_____
William A. Duvall,
Board Member

APPENDIX B

In The

UNITED STATES COURT OF CLAIMS

No. 359-79-C

JOHN H. THOMPSON, JR., et al.

v.

THE UNITED STATES

Contract; Wunderlich Act review; exhaustion of administrative remedies; waiver of objection to board jurisdiction.

March 7, 1980

Joseph F. Canterbury, Jr., attorney of record, for plaintiffs. *W. Kyle Gooch* and *Smith, Smith, Dunlap & Canterbury*, of counsel.

Lynn J. Bush, with whom was *Assistant Attorney General Alice Daniel*, for defendant. *Michael J. Vandamm*, U.S. Postal Service, of counsel.

Before DAVIS, *Judge, Presiding*, KUNZIG and BENNETT, *Judges*.

ORDER

This contract case is before the court on defendant's motion for summary judgment.[1] Defendant claims that

[1] This case has come directly to the court pursuant to Rule 166, as revised.

plaintiff, whose contracts with the Postal Service were all terminated for default in June 1978, failed to exhaust his administrative remedies, a prerequisite to suit in this court. Plaintiff answers that since no contracting officer's final decision was issued in the case, he can proceed directly in this court under the Contract Disputes Act of 1978[2] without exhausting administrative remedies. Because we find plaintiff abandoned without excuse the administrative proceeding he entered, we hold his claim here barred for failure to exhaust administrative remedies.

Prior to June 1978, plaintiff John H. Thompson, Jr., held a number of Postal Service contracts for the highway transportation of mail between points in the southern United States.[3] Plaintiff had contracted with the Postal Service in this manner for several years. Each of the contracts incorporated the standard "disputes" clause of the Basic Transportation Services Contract Provisions, P.S. Form 7407.

In 1976, the Postal Service adopted a 98 percent on-time efficiency standard for delivery of mail. Though plaintiff is questioning the propriety of such a rule and its "selective enforcement" against him, it is sufficient to note for purposes of the pending motion that plaintiff was apparently unable to meet the standard. This inability eventually led to the Postal Service termination of the contracts.

By letter dated June 21, 1978, just days after the termination, plaintiff's then attorney protested the Postal Service actions. He alleged sweeping misconduct and unfair dealing

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[2] Pub. L. No. 95-563, 92 Stat. 2383, 41 U.S.C.A. § 601 *et seq.* (1979 Supp.).

[3] Of the contracts in question, some were held in the name of John H. Thompson, Jr., some in the names of John H. Thompson, III, Thompson Truck & Equipment, John H. Thompson, Jr. and John H. Thompson, III or John H. Thompson, Jr. and Pat Thompson. All were subcontracted to plaintiff Night & Day Truck Lease Rental, Inc., a Texas corporation of which Thompson, Jr. was President. For simplicity in this order, the term "plaintiff" refers to John H. Thompson, Jr. and Night & Day Truck Lease Rental, Inc., and all other plaintiff persons and entities.

by the Postal Service which led to plaintiff's inability to perform the contracts.

The Postal Service contracting officer forwarded the letter directly to the Postal Service Board of Contract Appeals, which treated the letter as a notice of appeal. The Board notified Thompson that it had received the "notice of appeal," and provided him with a due date by which to file a complaint.

Then, on August 4, 1978, plaintiff filed with the Board a document captioned "Appellant's Amended Notice of Appeal," which the Board treated as a complaint. That document set forth the contracts in dispute and stated plaintiff's objections to what the Postal Service had done.

The Board, however, never again heard from plaintiff. Finally, plaintiff failed to respond to a rule to show cause why the case should not be dismissed for want of prosecution. The case was so dismissed on February 9, 1979.

Three months later, plaintiff sought to resurrect the claim, with new counsel writing letters to the Postal Service contracting officers summarizing plaintiff's objections and requesting decisions in the dispute. Both contracting officers refused (on advice of counsel) to issue decisions. Plaintiff then filed this suit.

Plaintiff's argument centers around his contention that there never was a final decision issued by the contracting officer as required in the disputes clause. Without a contracting officer decision from which an appeal could be taken, plaintiff argues, the Board of Contract Appeals had no jurisdiction, since its jurisdiction is appellate in nature. As a result, plaintiff now contends that the claim is still pending before the contracting officer and since more than 60 days have elapsed without a final decision, plaintiff can deem such inaction a negative decision and proceed directly in this court. *See* Contract Disputes Act of 1978, § 6, Pub. L. No. 95-563, 92 Stat. 2383.

The Government counters by arguing that there were indeed contracting officer decisions in regard to the disputed

contracts. Defendant has filed documents which it purports to be such decisions. The Government argues that the Board properly began procedures in plaintiff's appeal, when plaintiff inexplicably failed to continue participating in the proceeding, to the point that he failed to respond to a rule to show cause. That inaction constitutes failure to exhaust administrative remedies and bars plaintiff's case in this court, defendant concludes. *See, e.g., Monroe Garment Co. v. United States*, 203 Ct. Cl. 324, 488 F.2d 989 (1973); *Zidell Explorations, Inc. v. United States*, 192 Ct. Cl. 331, 334, 427 F.2d 735, 737 (1970).

We disagree with the Government that proper contracting officer final decisions were issued. Nonetheless, we hold plaintiff failed to exhaust his administrative remedies because he failed to complete a proceeding before the Board, whose jurisdiction he failed to contest in timely fashion.

As a preliminary matter, we reject defendant's contention that contracting officer decisions were issued pursuant to the disputes clause. The Postal Service's own Contracting Manual requires that in each contracting officer decision rendered under the disputes clause, a paragraph "substantially as follows" shall be included:

> This is the final decision of the Contracting Officer. Decisions on disputed questions of fact and on other questions that are subject to the procedure of the Disputes clause may be appealed in accordance with the provisions of the Disputes clause. If you decide to make such an appeal from this decision, written notice thereof (preferably in triplicate) must be mailed or otherwise furnished to the Contracting Officer within thirty days from the date you receive this decision. Such notice should indicate that an appeal is intended and should reference this decision and identify the contract by number. The Postal Service Board of Contract Appeals is the authorized representative of the Postmaster General for hearing and determining such disputes. The Rules of the Postal Service Board of Contract Appeals are attached. Postal Contracting Manual, § 1-313(d).

The documents defendant has filed in an attempt to show final decisions were issued amount to nothing more than notices of termination. They are completed "Route Service Order" forms containing only minimal information and a notice and date of termination. They do not indicate any status as final decisions; they do not mention any appeal procedures; they plainly do not contain the required paragraph.

In *Zidell Explorations, Inc. v. United States*, 192 Ct. Cl. 331, 427 F.2d 735 (1970), certain armed services procurement regulations required such information to be in final decisions of contracting officers. We held that a contracting officer letter of decision without such information was not a proper final decision. *Id.* at 336, 427 F.2d at 738. The documents filed in the instant case are similarly not proper final decisions.

Despite this absence of a contracting officer final decision, we can see no reason to allow plaintiff to question the Board's jurisdiction now. Once he received confirmation of his "Notice of Appeal" he did not then contest the Board's jurisdiction. Instead, he responded with a document captioned "Appellant's Amended Notice of Appeal," which set forth the contracts in question and plaintiff's claims with regard to those contracts.

In *General Dynamics Corp. v. United States*, 214 Ct. Cl. 607, 558 F.2d 985 (1977), we developed the rule that "the Board's lack of jurisdiction is a defense that may in effect be waived by failure to object in a timely fashion in that forum . . ." *Id.* at 620, 558 F.2d at 992. Plaintiff in the instant case did not object in timely fashion. Instead, he filed a responsive pleading to the Board's acknowledgment of his letter treated as a notice of appeal. In doing so, he waived any objection to the Board's jurisdiction.[4] Plaintiff plainly

[4] While judicial jurisdiction can never be waived by litigants, Board jurisdiction, which grows out of contractual provisions, may be expanded by agreement of the parties — through express amendment of their agreement or through administration of that agreement. *General Dynamics Corp. v. United States*, 214 Ct. Cl. 607, 558 F.2d 985 (1977).

failed to finish a proceeding in which he was engaged once he filed the document, and should not now escape the results of that proceeding, which were brought about by his own inaction.

In sum, we hold plaintiff cannot now question the Board's jurisdiction, because he waived that objection by initially participating in the Board's proceeding. We further hold that his failure to complete the Board proceeding bars his claim here because of failure to exhaust mandatory administrative remedies.

IT IS THEREFORE ORDERED, after consideration of the parties' submissions, including the administrative record, that defendant's motion for summary judgment is granted. The petition is dismissed.

BY THE COURT

March 7, 1980

Oscar H. Davis
Judge, Presiding

APPENDIX C

In The

UNITED STATES COURT OF CLAIMS

No. 359-79C

JOHN H. THOMPSON, JR., ET AL.

v.

THE UNITED STATES

Before DAVIS, *Judge*, Presiding, KUNZIG and BENNETT, *Judges*.

ORDER

This case comes before the court on plaintiffs' motion, filed March 19, 1980, for rehearing pursuant to Rule 151(b), with reference to the order entered herein on March 7, 1980, dismissing the petition. Upon consideration thereof, together with the response in opposition thereto, without oral argument,

IT IS ORDERED that plaintiffs' said motion for rehearing be and the same is denied.

April 25, 1980

BY THE COURT

Oscar H. Davis
Judge, Presiding

APPENDIX D

Constitution and Statutes

Fifth Amendment to the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Administrative Procedure Act

Section 4, 5 U.S.C. § 553: Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved —

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include —

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply —

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.

After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title [5 USCS §§ 556 and 557] apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except —

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule. (Sept. 6, 1966, P. L. 89-554, § 1, 80 Stat. 383.)

Contract Disputes Act of 1978

Section 6, 41 U.S.C. § 605: Decision by contracting officer — Contractor claims

(a) All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer. The contracting officer shall issue his decisions in writing, and shall mail or otherwise furnish a copy of the decision to the contractor. The decision shall state the reasons for the decision reached, and shall inform the contractor of his rights as provided in this chapter. Specific findings of fact are not required, but, if made, shall not be binding in any subsequent proceeding. The authority of this subsection shall not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle, or determine. This section shall not authorize any agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud.

Review; performance of contract pending appeal

(b) The contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as authorized by this chapter. Nothing in this chapter shall prohibit executive agencies from including a clause in government contracts requiring that pending final decision of an appeal, action, or final settlement, a contractor shall proceed diligently with performance of the contract in accordance with the contracting officer's decision.

Amount of claim; certification; notification; time of issuance; presumption

(c) (1) A contracting officer shall issue a decision on any submitted claim of $50,000 or less within sixty days from his receipt of a written request from the contractor that a decision be rendered within that period. For claims of more than $50,000, the contractor shall certify that the claim is

made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable.

(2) A contracting officer shall, within sixty days of receipt of a submitted certified claim over $50,000 —

(A) issue a decision; or

(B) notify the contractor of the time within which a decision will be issued.

(3) The decision of a contracting officer on submitted claims shall be issued within a reasonable time, in accordance with regulations promulgated by the agency, taking into account such factors as the size and complexity of the claim and the adequacy of the information in support of the claim provided by the contractor.

(4) A contractor may request the agency board of contract appeals to direct a contracting officer to issue a decision in a specified period of time, as determined by the board, in the event of undue delay on the part of the contracting officer.

(5) Any failure by the contracting officer to issue a decision on a contract claim within the period required will be deemed to be a decision by the contracting officer denying the claim and will authorize the commencement of the appeal or suit on the claim as otherwise provided in this chapter. However, in the event an appeal or suit is so commenced in the absence of a prior decision by the contracting officer, the tribunal concerned may, at its option, stay the proceedings to obtain a decision on the claim by the contracting officer.

Pub.L. 95—563, § 6, Nov. 1, 1978, 92 Stat. 2384.

Section 10, 41 U.S.C. § 609: Judicial review of board decisions — Actions in United States Court of Claims; district court actions: time for filing

(a) (1) Except as provided in paragraph (2), and in lieu of appealing the decision of the contracting officer under

section 605 of this title to an agency board, a contractor may bring an action directly on the claim in the United States Court of Claims, notwithstanding any contract provision, regulation, or rule of law to the contrary.

(2) In the case of an action against the Tennessee Valley Authority, the contractor may only bring an action directly on the claim in a United States district court pursuant to section 1337 of Title 28, notwithstanding any contract provision, regulation, or rule of law to the contrary.

(3) Any action under paragraph (1) or (2) shall be filed within twelve months from the date of the receipt by the contractor of the decision of the contracting officer concerning the claim, and shall proceed de novo in accordance with the rules of the appropriate court.

Finality of board decision

(b) In the event of an appeal by a contractor or the Government from a decision of any agency board pursuant to section 607 of this title, notwithstanding any contract provision, regulation, or rules of law to the contrary, the decision of the agency board on any question of law shall not be final or conclusive, but the decision on any question of fact shall be final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence.

Remand or retention of case

(c) In any appeal by a contractor or the Government from a decision of an agency board pursuant to section 607 of this title, the court may render an opinion and judgment and remand the case for further action by the agency board or by the executive agency as appropriate, with such direction as the court considers just and proper, or, in its discretion and in lieu of remand it may retain the case and take such additional evidence or action as may be necessary for final disposition of the case.

Consolidation

(d) If two or more suits arising from one contract are filed in the Court of Claims and one or more agency boards, for the convenience of parties or witnesses or in the interest of justice, the Court of Claims may order the consolidation of such suits in that court or transfer any suits to or among the agency boards involved.

Judgments as to fewer than all claims

(e) In any suit filed pursuant to this chapter involving two or more claims, counterclaims, cross-claims, or third-party claims, and where a portion of one such claim can be divided for purposes of decision or judgment, and in any such suit where multiple parties are involved, the court, whenever such action is appropriate, may enter a judgment as to one or more but fewer than all of the claims, portions thereof, or parties.

Pub.L. 95—563, § 10, Nov. 1, 1978, 92 Stat. 2388.